

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE

Indianapolis, IN

D.O. McCOMB & SONS, INC. and
ESTATE INSURANCE GENERAL AGENCY, INC.,
A Single Employer
Employer

and

Case 25-RC-10066

CHAUFFEURS, TEAMSTERS AND HELPERS
LOCAL UNION NO. 414, a/w INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held November 13, 2001, before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time funeral directors, embalmers, and general funeral service employees employed by D.O. McComb & Sons, Inc. and Estate Insurance General Agency, Inc., a single employer, at its Fort Wayne and Auburn, Indiana facilities; BUT EXCLUDING all clerical employees, pre-need counselors, casual employees, all guards and supervisors as defined in the Act, and all other employees.

The unit found appropriate herein consists of approximately 32 employees for whom no history of collective bargaining exists.

I. STATEMENT OF FACTS

The Employer, D.O. McComb & Sons, Inc. (hereinafter called "McComb"), an Indiana Corporation, is engaged in providing funeral, cremation and other death-related services, and in the sale of related items such as burial mausoleum sites, monuments, and memorials. The corporation is owned by Walter McComb and his two sons David and Douglas, hereinafter the "McComb family." McComb employs approximately 39 employees as funeral directors, embalmers, general funeral workers, and office clericals. There is no history of collective bargaining for any of the McComb employees.

In addition to this corporation, Douglas and David McComb own two additional companies, Estate Insurance General Agency, Inc. and General Buying Group, Inc. d/b/a Premier Pre-Need, both of which are Indiana corporations. Estate Insurance General Agency, Inc. (hereinafter called "Estate") was incorporated in 1985 and General Buying Group, Inc. d/b/a Premier Pre-Need (hereafter "GBG") was incorporated in 1999. Estate is engaged in the sale of pre-paid and pre-planned funeral services and products, as well as life insurance to cover the cost thereof. Estate employs approximately eighteen salespersons who are referred to as pre-need counselors, as well as a clerical staff. GBG provides funeral consultation and management services for other independently owned funeral homes. The parties are in agreement that persons employed on a casual basis should be excluded from the petitioned unit, as well as persons employed by GBG.

In contention are the appropriate unit placement of approximately 7 clerical employees employed by McComb; 3 clerical employees employed by Estate, and the approximately 18 pre-need counselors employed by Estate. The Employer contends that McComb and Estate are a single integrated employer and that the unit should include all employees from both companies. It further contends that the employees share a sufficient community of interest that it would be unreasonable to exclude them from the petitioned unit.

McComb is a fourth generation business, founded in 1925. It is comprised of six funeral homes (also referred to as chapels), located in Fort Wayne, Indiana and a seventh located in

Auburn, Indiana. Its administrative office is located at one of the funeral homes in Fort Wayne. The McComb family of companies provide a variety of death-related services. Pre-Need services are provided to customers whose death is not imminent but who wish to plan their funeral arrangements in advance. Customers provide pre-need counselors (salespersons) with information such as their desired funeral arrangements, family information, religious affiliation, information regarding their estate and their selection of merchandise such as caskets and monuments. Near-Need services involve funeral arrangements made just prior to an individual's death, usually involving a nursing home patient or a person who is terminally ill. At-Need services occur after an individual's death and decisions about these funeral services are made by surviving family members. After-Care services are provided to surviving family members after funeral services.

McComb employs eighteen funeral directors, seven embalmers, seven general funeral service employees and seven office clerical employees. The funeral directors are licensed by the State of Indiana. This is a dual licensure which also allows them to act as embalmers. Funeral directors are paid an hourly wage which ranges from about \$11.00 to \$15.00 an hour. They are paid time and one-half for any hours worked in a week in excess of forty. They work a rolling five week schedule in which they work 45 hours a week in the first three weeks, 41 hours in the fourth week, and 50 hours in the fifth week. Funeral directors are paid for nine hours each day, including a one-hour lunch period. About 65% of funerals are arranged after the death of a person, and such arrangements are made at funeral homes with the funeral directors by members of the decedent's family. The directors also conduct all funerals. Additionally, they have the opportunity to earn commissions from the sale of merchandise. Both their salary and commissions are paid by McComb. Two of the funeral directors are also licensed insurance agents who also serve as pre-need counselors, and their dual-function status will be discussed in greater detail subsequently.

McComb's seven embalmers are also State-licensed. This is the same license as held by the funeral directors. Embalmers are paid an hourly wage which ranges between about \$9.00 and \$13.00 an hour. They are paid time and one-half for any hours worked in a week, in excess of forty. They are scheduled to work two twenty-four hour shifts for three consecutive weeks, during the fourth week, they work one twenty-four hour shifts and then two nine hour shifts. Like the funeral directors, embalmers can earn additional income in the form of commissions from the sale of merchandise such as monuments, graves, and markers. The salary portion of their compensation is paid by McComb. The record does not reflect whether the embalmers perform their primary functions at a central embalming location, or the McComb funeral homes.

McComb employs six or seven non-licensed, general funeral service employees. They are paid between \$8.00 and \$10.00 an hour and are paid time and one-half for any hours worked in excess of forty per week. Their duties include parking cars, arranging flowers, driving the vans that take flowers from the funeral homes to the cemeteries, and general cleaning duties, including the maintenance of vehicles and property. These employees generally work from 7:00 a.m. to 4:00 p.m. or 1:00 p.m. to 10:00 p.m. These employees can also earn commissions from the sale of merchandise. However, the wage portion of their compensation is paid by McComb. Their primary work locations are not reflected in the record; however, based upon their duties it is presumed that they spend the majority of their time at the individual funeral homes.

McComb also employs seven clerical employees who work at its administrative office. McComb employs one bookkeeper and an assistant bookkeeper. A third clerical's duties include arranging for veterans' benefits to pay for funeral costs and handling employee health insurance issues. A fourth clerical is responsible for entering funeral pre-arrangements completed by the pre-need counselors into a centralized computer system. Another clerical provides obituaries to newspapers; manages inventory; and processes documents involving Terra Services.¹ Terra Services is a fourth company owned by the McComb family which sells memorials, monuments, grave spaces, and mausoleums. A sixth clerical employed by McComb handles cremation-related work and death certificates. Another receives pre-need contracts from the pre-need counselors. She reviews the contracts to make sure that they have been completed properly and then makes sure that all the merchandise in the contract has been priced correctly. All of these clerical employees are hourly paid and are paid time and one-half for any work in excess of forty hours in a week. The office employees work a nine hour day, beginning at 7:30 a.m. or 8:00 a.m. They are hourly paid, although the record does not reflect their wage ranges. They are also paid for their lunch hours. Like other McComb employees, the clericals can earn commissions from the sale of merchandise. It is presumed that, like other McComb employees, their compensation is paid by that entity. All of these employees work at the administrative office facility.

Estate employs eighteen pre-need counselors, or salespersons. The primary source of income of the pre-need counselors are commissions derived from their sale of pre-paid funeral arrangements and insurance policies. When a pre-need counselor meets with a family and completes a funeral arrangement which is not funded, however, s/he receives a flat fee from McComb of an unspecified amount. Pre-need counselors have a flexible schedule based upon the appointments with customers which they schedule for themselves. Approximately 80% of the appointments occur in customers' homes, while the remainder presumably occur at one of the funeral homes. Generally, the pre-need counselors schedule appointments between 7:30 or 8:00 a.m. and 8:00 p.m. The pre-need counselors hold insurance licenses issued by the State of Indiana. Although the record is not entirely clear, it appears that customers purchase life insurance policies from Estate in order to finance their own or the funeral of loved ones. Pre-need counselors sell these insurance policies as well as assist customers in pre-planning their funeral arrangements. As part of their duties, pre-need counselors may also meet with the family of a decedent during the arrangements stage of the funeral the counselor has sold, along with the funeral director who will be conducting the funeral. The record is not clear concerning the frequency of such joint meetings between funeral directors and pre-need counselors. Additionally, after the funeral is complete, the pre-need counselor and the funeral director may meet with family members in an "after care" meeting. During this meeting the funeral director and the pre-need counselor might provide family members with information about the cause of decedent's death, and may survey the family concerning their level of satisfaction with the funeral services provided. In addition to performing their work at customers' homes, pre-need counselors also spend some time working at McComb's administrative facility where office space is available. This space includes access to a telephone and computer. However, it is not

¹ No evidence was entered into the record that Terra Services employs any employees.

required that pre-need counselors spend any specified amount of time per day or per week at this facility.

Estate also employs three clerical employees. Like the McComb clericals, they, too, work at the administrative facility. One Estate clerical is employed as the data base administrator. She is responsible for organizing the data base and generating reports therefrom. McComb and Estate share a common data base, to which employees of both companies have access. This data includes information concerning the decedent and family members. A second clerical updates the data base with information from funerals which may not have been documented by the funeral director, such as information about next of kin and their names and addresses. The third clerical also works with the data base; her primary duty is to update records based upon the information provided from pre-arrangement meetings. All of these employees are paid hourly; are paid time and one-half for overtime; and are paid for a nine hour day, including lunch. The Estate clerical employees work a schedule which is similar to that of the McComb clerical employees. Their hourly rates of pay are not known.

All of the above-mentioned classifications of employees receive the same life and health insurance benefits. McComb employees participate in a profit-sharing plan, however, while Estate employees participate in a 401(k) plan. Additionally, there is a cafeteria in the administrative facility and employees may eat lunch at this location. The exception to this would be those employees at locations other than the office on any given day, including the pre-need counselors, funeral directors, embalmers and service employees who may be working at customer or funeral homes.

The General Manager of Estate² supervises the day-to-day work of the pre-need counselors and two of the Estate clerical employees. A General Manager also oversees the operations of McComb; beneath him two additional Managers³ supervise the funeral directors, and schedule and assign work to the embalmers. There was equivocal testimony by owner David McComb concerning the supervisory authority of an additional embalmer and a funeral director/embalmer.⁴ Owner McComb initially testified that the embalmer and funeral director/embalmer supervise the technical aspects of embalmers' work. When asked by Petitioner's counsel if the embalmer made recommendations concerning discipline and hiring, owner McComb testified that he did, and that his recommendations were "most often" followed by the McComb family without independent investigation. Following an off-the-record period, however, owner McComb contradicted this testimony by stating that he would not follow the recommendations of the two individuals without an independent investigation. Needless to say, such a reversal of testimony raises credibility concerns.⁵

² The General Manager of Estate is Mark Klingenberger.

³ The two Managers are Taron Smith and Bruce Manck.

⁴ These individuals are Robert Pinder and Mike Murphy, respectively.

In respect to the hiring of non-licensed funeral workers, the McComb family does not become involved until the final interview. In the case of a licensed employee, such as a funeral director or embalmer, one or more members of the family might be involved from the beginning of the hiring process.

II. DISCUSSION

The Employer contends that all of the employees of McComb and Estate should be included in any unit found appropriate herein. Its argument is two-fold, first that McComb and Estate are a single integrated employer and second, that the employees of both companies share a community of interest such that they should all be included in the unit. The Petitioner, however, believes that the clerical employees and pre-need counselors, do not share a community of interest with the other employees and, therefore, should be excluded from the unit.

The Board considers a variety of factors in determining whether two or more companies constitute a single employer, including whether they are affiliated business enterprises with common ownership, officers, directors, management and supervision; whether they formulate and administer a common labor policy; share common facilities; provide services for and sales to each other; have interchanged personnel with each other; and whether they hold themselves out to the public as a single company, Radio and Television Broadcast Technicians Local Union 1264, 380 US 256 (1965). In making its assessment the Board gives special weight to the centralized control of labor relations, Masland Industries Inc. and Masland Transportation, 311 NLRB 184 (1993). In the present case, there is a common familial ownership of the two companies, and common labor and personnel policies are established by the McComb family for both companies. Both businesses operate from the same administrative office and share a data base of customer information. One of the primary purposes of Estate's creation was to develop business for McComb, and thus there is an interrelation of operations between the two companies; it also appears that both companies are held out to the public as D.O. McComb & Sons, Inc. It is unknown whether other requisite characteristics of a single integrated enterprise are present. For example, it is not known whether one company leases office space from the other as a result of an arms-length transaction, or whether space is provided at little or no cost. It is not known whether either company provides administrative services to the other; nor is it known whether one company reimburses the other for the use of the data base. There are only two instances of employee interchange among potential unit members since 1985, and it is not known whether common officers, board members, managers or supervisors exist. Nonetheless, in light of the characteristics which are present and indicative of a single enterprise, and in the absence of challenge from the Petitioner to the Employer's assertion that it is a single employer, it is concluded for that D.O. McComb & Sons, Inc. and Estate Insurance General Agency, Inc. constitute a single integrated enterprise.

⁵ Although it cannot be determined herein whether Pinder and Murphy are supervisors within the meaning of Section 2(11) of the Act, should they vote at the election ordered herein, the Petitioner can challenge their eligibility.

Under Section 9(b) of the Act, the Board has broad discretion to determine "the unit appropriate for the purposes of collective bargaining" in each case "in order to assure to employees the fullest freedom in exercising the rights guaranteed by the Act," NLRB v. Action Automotive, Inc., 469 U.S. 490 , 494-97 (1985). The Board's discretion extends to selecting an appropriate unit from the range of units which may be appropriate in any given factual setting; it need not choose the most appropriate unit, American Hospital Association v. NLRB, 499 U.S. 606, 610 (1991); P.J. Dick Contracting, Inc., 290 NLRB 150, 151 (1988). In the instant case, the parties have agreed that any unit will include licensed funeral directors, licensed embalmers, and non-licensed general funeral workers. In addition, they agree that the employees of GBG and casual employees should be excluded. In dispute are the unit placement of the 7 clerical employees who work for McComb and the 18 pre-need counselors and 3 clerical employees who work for Estate.

In determining an appropriate bargaining unit, the ultimate question is whether the employees share a sufficient community of interest to require their joinder within one unit, Alois Box. Co., Inc., 326 NLRB 1177 (1998); Washington Palm, Inc., 314 NLRB 1122, 1127 (1994). In determining whether employees share such a community of interest, the Board weighs a variety of factors, including differences in wages or method of compensation; different hours of work; different employment benefits; separate supervision; the degree of similar or dissimilar qualifications, training and skills; differences in job functions; the amount of working time spent away from the facility; the integration of work functions; the degree of interchange between employees as well as the degree of employee contact; and the history of bargaining, NLRB v. Action Automotive, Inc., 469 U.S. 490 , 494-97 (1985); Kalamazoo Paper Box Corp., 136 NLRB 134, 137 (1962).

In the case at hand, the clerical employees perform work functions and possess skills substantially different from the funeral directors, embalmers and general funeral workers. The clerical employees perform functions traditionally regarded as "office clerical," including such tasks as bookkeeping, data entry and answering phones. The clericals are not required to possess any state license, nor do they play any direct role in funeral, cremation or cemetery services. Their contact with family members of decedents and mourners is minimal. They work exclusively at McComb's administrative office, while members of the bargaining unit perform their work primarily at the funeral homes, at cemeteries and crematoriums. The record reflects no significant degree of contact between clerical employees and members of the petitioned unit. There is no evidence of any employee interchange having occurred between the two groups. Thus, there is no evidence that any clerical employees have substituted in the absence of funeral directors, embalmers or general workers, or vice versa. Nor is there any evidence of permanent transfers between the two groups. The work hours of the two groups also differ, as do the persons who direct and oversee their work. In light of these differences, it is concluded that the ten disputed clerical employees do not share a sufficient community of interest with members of the petitioned unit to require their joinder therein.

In Riverside Memorial Chapels, Inc., 226 NLRB 2, 3 (1976), the Board addressed the issue of whether one or both of two groups of clerical employees should be included in a unit of funeral directors and related personnel. In that case, it was concluded that the receptionists who worked in the funeral homes and actually came into contact with mourners, should be included in

the unit. Conversely, administrative personnel and switchboard operators were excluded. Specifically it was held: "that their duties are primarily clerical and do not substantially contribute to the rendition of the funeral services or arrangements. In a similar case, D.W. Newcomer's Sons, 117 NLRB 565, 566 (1957), the Board included in the bargaining unit a group of clerical- receptionists who, in addition to those duties, acted as switchboard operators, hairdressers for the deceased, and who met and escorted mourners to the appropriate locations. A review of their duties found that about 75% of their time was spent in "work closely allied with that performed by employees whom Petitioner would include in the unit." These factors are absent in the present case.

The record also indicates that the pre-need counselors lack a sufficient community of interest with unit members to require their addition to the unit. The pre-need counselors are essentially outside salespeople; this is demonstrated most clearly by their mode of compensation, a commission against a draw. All of the other employees in the proposed unit are paid hourly and receive overtime compensation for hours worked in excess of forty hours per week. Additionally, unlike members of the petitioned unit, pre-need counselors have no fixed hours of work. Unlike unit members, the counselors also spend the majority of their work time away from the funeral homes. While the Employer provides office space for pre-need counselors in its administrative office facility, there is no requirement that the counselors use this facility. Unlike other employees, the pre-need counselors are allowed to determine their own work hours. Contact between unit members and pre-need counselors is limited. Unlike unit members who perform the majority of their work in the Employer's funeral homes, pre-need counselors spend the majority of their time in the homes of prospective customers or at the administrative office. The record indicates that the pre-need counselors attend meetings with members of the unit at the administrative facility, but such meetings occur at most, once a month. In addition, pre-need counselors may attend meetings between funeral directors and customers for those pre-planned funerals they have arranged. They may also attend the initial viewing of a decedent to meet grieving family members in order to develop new sales leads. However, the record indicates that these contacts are relatively brief and might not consist of much more than a word of condolence and the distribution of a business card.

The pre-need counselors have similar fringe benefits to the employees in the proposed bargaining unit, with the exception of their retirement benefit. Like other Estate employees, pre-need counselors are covered by a 401(k) plan, as opposed to participating in a profit sharing plan provided to McComb employees. Their form of remuneration also differs from that of unit members. Pre-need counselors are also separately supervised. The skills and functions of pre-need counselors differ markedly from those of unit members, as is reflected in their differing licensure. Only two instances of employee interchange between the counselors and unit members have occurred since 1985. Due to these differences, it is concluded that the pre-need counselors do not share a sufficient community of interest with unit members to require their joinder within the petitioned unit, and consequently, they shall be excluded from the unit found appropriate herein, See generally The Outlet Company, 218 NLRB 21 (1975); Aquacultural Research Corp., 215 NLRB 1, 3 (1974); Frank B. Amundson, et al., 238 NLRB 816 (1978).

As mentioned earlier, two employees, Mark Freemion and Kent Miller, are licensed both as insurance agents and as funeral director/embalmers. Both Freemion and Miller initially began their careers with McComb as funeral directors. When Estate was incorporated in the mid-1980's they both obtained insurance licenses. Since that time they have functioned as both funeral directors and pre-need counselors. The record indicates that since obtaining his insurance license, Miller has continued to be scheduled roughly 45 hours a week as a funeral director and has made appointments to meet with families in the capacity of a pre-need counselor. The evidence regarding Mark Freemion is in dispute. While the Employer's witness asserted that he maintains a schedule much like that of Miller, the Petitioner's witness contended that he only recently rejoined the staff of McComb as a full-time funeral director. The Petitioner asserts that prior to this Freemion was employed on a full-time basis by Estate as a pre-need counselor. A dual function employee is one who performs more than one function for the same employer. Dual function employees are included within a petitioned unit even if they spend less than a majority of their time performing unit work, so long as they regularly perform duties similar to those performed by unit employees, and they do so for sufficient periods of time to demonstrate that they have a substantial interest in the working conditions of the unit. In the case at hand, the record indicates that Miller regularly performs unit work, and Freemion either performs unit work with regularity, or on a full-time basis. In either event, the employees share a sufficient community of interest with members of the petitioned unit to be included therein, Martin Enterprises, Inc., 325 NLRB 714, 715 (1998).

III. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned, among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees in the unit who are engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements. Those in the unit who are in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are former unit employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Chauffeurs, Teamsters and Helpers Local Union No. 414, a/w International Brotherhood of Teamsters.

IV. NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices, Club Demonstration Services, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

V. LIST OF VOTERS

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the undersigned within 7 days from the date of this Decision. North Macon Health Care Facility, 315 NLRB 359 (1994). The undersigned shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 25's Office, Room 238, Minton-Capehart Federal Building, 575 North Pennsylvania Street, Indianapolis, Indiana 46204-1577, on or before **December 6, 2001**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099-14th Street. N.W., Washington, DC 20570. This request must be received by the Board in Washington by December 13, 2001

DATED AT Indianapolis, Indiana, this 29th day of November, 2001

/s/Roberto G. Chavarry

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